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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 666

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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IN THE

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No. .....

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Charles E. Lester and Edward Anthony Buccieri pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-styled case on July 8, 1966.

OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 363 F. (2) 68, and appears at page 59 of the Appendix to this Petition.

JURISDICTION.

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 8, 1966. The Order of the Court of Appeals denying the Petition for Re-hearing was entered September 15, 1966. An Order staying the mandate of the Court of Appeals thirty days was entered September 21, 1966.

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

In this case Petitioners were charged in Count One of the indictment to have conspired with others, including three police officers, under 18 U. S. C., Section 371 to violate 18 U. S. C., Section 242. Petitioners, both of whom were and are private citizens legally incapable of violating 18 U. S. C., Section 242, were found guilty. All others, including the police officers so accused, were found not guilty by the jury.

By Count Two of the indictment Petitioners, together with another private citizen and the three police officers, were accused of violation of 18 U. S. C., Sections 242 and 2. Petitioners and all so accused were upon this count found not guilty by the jury.

This case, therefore, presents the following questions:

1. May the conviction of Petitioners of conspiracy between themselves alone under 18 U. S. C., Section 371 to violate 18 U. S. C., Section 242 be sustained when, as here, both Petitioners are private citizens legally incapable of acting under color of law in violation of 18 U. S. C., Section 242?

2. May a conviction of private persons under 18 U. S. C., Section 371 to violate 18 U. S. C., Section 242 be

sustained when it was conclusively established that there was a total absence of state action?

3. Did the Court err in refusing Instruction No. 20 offered by Petitioners?

4. May 18 U. S. C., Section 2 be applied to 18 U. S. C., Section 371 to sustain a conviction of Petitioners as private persons convicted under Section 371 to violate Section 242, where no person acting wilfully under color of law and capable of violating Section 242 conspired with those convicted, and where upon Count Two of the same indictment the jury's verdict of not guilty conclusively established that there was no violation of Section 242 or Section 2?

5. In every criminal offense must there be a principal capable of committing the offense?

6. Did the Court err in not instructing the jury that to convict Petitioners it was not sufficient that Petitioners had a generally bad purpose, but that to convict it was necessary for the jury to find that Petitioners had the specific intent and purpose to wilfully deprive Ratterman of rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

18 U. S. C., § 2.

Principals.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever wilfully causes an act to be done, which if directly performed by him or another, would be an

offense against the United States, is also a principal and punishable as such.

18 U. S. C., § 242.

Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U. S. C., § 371.

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

XIV Amendment to the Constitution of the United States, Section 1.

Sec. 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INDICTMENT.

The two-count indictment returned by the Federal Grand Jury October 27, 1961, is set forth in the Appendix to this Petition at pages 57, 58.

INSTRUCTIONS REQUESTED BY PETITIONERS.

The instruction requested by the Petitioners and refused by the Court appears at Appellants' Appendix 262a and is in this language:

> Unless you find from the evidence that one or more of the defendants, Ciafardini, White and Quitter, were acting under color of law and guilty of the alleged charges in Count 1 and Count 2 of the indictment, then the law is for the defendant, Charles E. Lester, and you so shall find; and further, should you believe from the evidence that one or more of the officers, Ciafardini, White and Quitter, guilty of the charges alleged in Count 1 and Count 2 of the indictment, the jury must further believe from the evidence that said Charles E. Lester entered into a conspiracy with said officers or aided or abetted said officers to commit the offenses so charged in Count 1 and Count 2, otherwise the law is for the defendant, Charles E. Lester, and you shall find him not guilty on Count 1 and Count 2 of the indictment.

STATEMENT OF CASE.

Petitioners, Charles E. Lester and Edward Anthony Buccieri, were convicted upon a jury verdict finding them guilty, in count one of an indictment, which alleged that petitioners and another private citizen, one Carinci, conspired together and with three members of the police force of Newport, Kentucky, to commit an offense against the laws of the United States, in violation of 18 U. S. C., § 371.

The offense averred to be the object of this conspiracy was to violate 18 U. S. C., § 242, in that the police officers would, while acting in their official capacity, willfully deprive one George W. Ratterman, under color of state law, "of rights, privileges and immunities secured to him and protected by the Fourteenth Amendment to the Constitution of the United States; namely, the right not to be deprived of liberty without due process of law, the right to be free from arrest by an officer acting arbitrarily and without legal justification or cause, and the right not to be denied the equal protection of the law." It is further alleged in the indictment that: "It was the plan and purpose of the conspiracy that (the three defendant police officers) . . ., while acting . . . under color of law, would arrest and imprison George W. Ratterman, charge him with a violation of law, and cause his conviction, all knowing him to be innocent."

In count two of the indictment, the police officers were accused of the commission of the substantive offense which was the asserted object of the conspiracy; while petitioners and Carinci were charged with aiding and abetting the police officers in their violation of 18 U. S. C., § 242. The jury convicted both petitioners of the conspiracy charged in count one, but acquitted them of the substantive offense charged in count two. All other de-

fendants, including the three police officers, were acquitted by jury verdict of all charges—both the conspiracy and the substantive offense.

Additional facts stated by the Court in its majority opinion are:

The evidence, direct and circumstantial, in the case at bar, together with the inferences which the jury could reasonably have drawn therefrom, combined to warrant the jury in finding *inter alia* the following facts: The Glenn-Tropicana, a combination nightclub and hotel in Newport, Kentucky, across the Ohio River from Cincinnati, had been favored for many years with somewhat-less-than-vigorous enforcement of the State laws prohibiting gambling and prostitution. In April of 1961, upon the announcement of George W. Ratterman as a "reform" candidate for sheriff, defendant Carinci, a co-proprietor of the Glenn-Tropicana, telephoned one Thomas Paisley and asked him to arrange a meeting for Carinci with Ratterman.

A few days later, on April 14, petitioner Lester, attorney for the Glenn-Tropicana, telephoned a Newport photographer and asked him to talk to petitioner Buccieri, another co-proprietor of the Glenn-Tropicana, about a picture. In due course, the photographer contacted Buccieri who told the photographer that his services would be needed "to take a picture of a man and a woman in a room"; and added the assurance: "Now, don't worry about anything, we will protect you." The photographer gave Buccieri a telephone number where he could be reached at night.

On May 8, 1961, Paisley came to Cincinnati and had cocktails and dinner with Ratterman, commencing at about 5:45 in the afternoon, following which they met with Carinci at a Cincinnati restaurant. After consuming

several drinks in the course of the evening, Ratterman and Carinci and Paisley went over to the Glenn-Tropicana for supper. Upon their arrival about 1:30 A. M., Ratterman and Paisley were ushered into Glenn-Tropicana's suite 314 on the third floor near which an illegal gambling operation was regularly conducted. Petitioner Buccieri then sent Rita Desmond, one of the club's showgirls, upstairs to suite 314 to have a drink with Paisley and Ratterman. Shortly after Rita arrived, Ratterman, who was extremely drowsy by now, left the sitting room of the suite and lay down in an adjoining bedroom.

Carinci next directed April Flowers, another of the Glenn-Tropicana's showgirls, to stop her striptease act and go at once to suite 314 without bothering to change her costume. When April arrived, she was asked by Rita to go into the bedroom and try to awaken Ratterman. April did so, but her efforts failed to arouse Ratterman. Carinci then came to suite 314 and requested Rita and Paisley to go elsewhere in the club with him, leaving April and Ratterman alone in the bedroom of 314.

Meanwhile, approximately ten minutes after Ratterman had arrived at the Glenn-Tropicana, someone called the photographer's home, and left word for him to call Buccieri at the club. However, the photographer did not return the call. At 2:20 A. M., the gambling operations on the third floor were closed substantially earlier than usual, and the patrons were asked to leave the third floor.

At 2:32 A. M., an anonymous phone call was received at the Newport police station for one of the defendant police officers, who was told: "If you want to get George Ratterman, he is in Room 314 of the Glenn Hotel." The three defendant officers thereupon went to the Glenn-Tropicana at 2:35 A. M., where they first arrested Carinci, and then April Flowers as she emerged from the bedroom of suite 314. That done, there followed a brief scuffle

between the police officers and Ratterman, and the latter was taken into custody, wrapped in a bedspread. Testimony by the police officers that he was found with his trousers off was disputed by Ratterman, who said that his trousers had been removed from him by the officers.

Petitioner Lester promptly arrived at the police station, after having called a bondsman who posted bail for April Flowers and Carinci, but refused to provide bail for Ratterman. Petitioner Lester admitted that he had been up since 2:00 A. M., "when the Ratterman deal broke" —well more than a half hour before the arrests occurred. At approximately 4:00 A. M. following the arrests, all six persons accused in the indictment—including the three police officers—were seen together at the Glenn-Tropicana, and at the Flamingo Club an hour later.

Examination of Ratterman the following day disclosed traces of from three to four grams of chloral hydrate ["knockout drops"] estimated to have been ingested between 10:00 and 11:00 P. M. the previous evening.

REASONS FOR GRANTING THE WRIT.

Petitioners say this Petition for Writ of Certiorari should be granted because:

1. The decision of the Court of Appeals is in conflict with the decisions of this Court in United States v. Guest, March 28, 1966, 383 U. S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170; United States v. Price, March 28, 1966, 383 U. S. 787, 16 L. Ed. 2d 267, 86 S. Ct. 1152; Screws v. United States, 1944, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 ALR 1330; Williams v. United States, 1951, 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774; Gebardi v. United States, 1932, 287 U. S. 112, 53 S. Ct. 35, 77 L. Ed. 206; United States v. Gooding, 1827, 25 U. S. 460, 12 Wheat. 460; United States v. Mills, 1833, 7 Pet. 138, 8 L. Ed. 636;

Shuttlesworth v. Birmingham, 1963, 373 U. S. 262, 10 L. Ed. 2d 335, 83 S. Ct. 1130; Parr v. United States, 1960, 363 U. S. 370, 4 L. Ed. 2d 1277, 80 S. Ct. 1171; and Coffin v. United States, 1896, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109. (See O'Hara v. Mattix (June 27, 1966), 255 F. Supp. 540 for the understanding by the United States District Court for the Western District of Michigan of the teaching of the **Guest** and **Price** cases.)

2. The decision of the Court of Appeals is in conflict with Barron v. United States, First Circuit, 5 F. 2d 799; Giragosian v. United States, 1965, First Circuit, 349 F. 2d 166; Kaufman v. United States, Second Circuit, 212 F. 613; Downs v. United States, Third Circuit, 1925, 3 F. 2d 855; United States v. Tornabene, Third Circuit, 222 F. 2d 875; United States v. Pihakis, 1955, Third Circuit, 224 F. 2d 898; Johnson v. United States, Fifth Circuit, 1907, 158 F. 69; King v. United States, July 1966, Fifth Circuit, Case No. 23637, not yet reported; Koehler v. United States, 5th Circuit, 189 F. 2d 711, see Supreme Court Koehler v. United States, 1951, 342 U. S. 852, 72 S. Ct. 75, 96 L. Ed. 643; Brown v. United States, Sixth Circuit, 1953, 204 F. 2d 247; Chadwick v. United States, Sixth Circuit, 1905, 141 F. 225; Scott v. United States, Sixth Circuit, 1904, 130 F. 429; United States v. Hoffa, 1965, Sixth Circuit, 349 F. 2d 20; Banks v. United States, 1957, Seventh Circuit, 239 F. 2d 409; Carter v. United States, Eighth Circuit, 1927, 19 F. 2d 431; Culp v. United States, Eighth Circuit, 1942, 131 F. 2d 93; Cohen v. United States, Ninth Circuit, 1944, 144 F. 2d 984; Hernandez v. United States, 1962, Ninth Circuit, 300 F. 2d 114; Curtis v. United States, Tenth Circuit, 1933, 67 F. 2d 943; Von Patzoll v. United States, 1947, Tenth Circuit, 163 F. 2d 216; and Colosacco v. United States, 1952, Tenth Circuit, 196 F. 2d 165, all holding that at least one of alleged conspirators must possess capacity to commit the substantive offense or that in a prosecution for aiding and

abetting it must be alleged and proven that the offense had in fact been committed.

3. The decision of the Court of Appeals in applying 18 U. S. C., § 2 to sustain a conviction of conspiracy under § 371 to violate § 242 is constitutionally impermissible where, as here, the jury verdicts conclusively established no violation of § 242 and § 2 and conclusively established that Petitioners did not conspire with any person (the police defendants) capable of acting wilfully and under color of law.

4. The decision of the Court of Appeals by applying 18 U. S. C., § 2 and 18 U. S. C., § 371 to sustain a conviction of Petitioners of conspiracy to violate § 242 abrogates the essential element in every criminal offense that there must be a principal capable of committing the offense. The police were acquitted on both counts of the indictment. If the decision of the Court of Appeals is not reversed petitioners stand convicted as aiders, abettors, or of causing the commission of a crime which has not been committed.

5. 18 U. S. C., § 2 is not applicable to sustain a conviction of a 18 U. S. C., § 371 conspiracy to violate § 242 in that aiding, abetting, or causing one to commit an offense against the United States does not presuppose the existence of an agreement, which is the gist of a conspiracy, and especially as here, where the police officers who were the only defendants capable of violating § 242 were found not guilty of conspiracy with Petitioners and not guilty of the commission of the substantive offense.

6. The effect of the decision of the Court of Appeals of applying 18 U. S. C., § 2 to 18 U. S. C., § 371 to violate § 242 to sustain Petitioners' conviction as private citizens of conspiring with themselves alone to violate § 242 would bring within the statute crimes done by men in general in the ambit of their personal pursuits and as so applied is constitutionally impermissible.

7. The effect of the majority opinion of the Court of Appeals in sustaining the conviction of Petitioners for a § 371 conspiracy to violate § 242 without a co-conspirator capable of violating § 242 has eliminated the essential elements required to violate § 242; that is, willful state action under color of law.

8. The refusal of the District Court to give Petitioners' offered Instruction No. 20 denied to Petitioners their constitutional right that the government must prove beyond a reasonable doubt that the police officers acted wilfully and under color of law and conspired with Petitioners to violate § 242. The verdicts acquitting the police of conspiracy with Petitioners and acquitting the police of the substantive offense denies the existence of the essential facts; that is, state action by participation of the police in the alleged conspiracy.

9. The failure of the trial court to instruct the jury "that to convict petitioners it was not sufficient that petitioners had a generally bad purpose, but that to convict it was necessary for the jury to find that petitioners had the specific intent and purpose to wilfully deprive Ratterman of rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States" denied to petitioners their constitutional right to have the government prove such specific intent as required by the decision of this Court in Screws v. United States, 1944, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 ALR 1330, and Williams v. United States, 1951, 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774.

ARGUMENT.

1. May the Conviction of Petitioners of Conspiracy Between Themselves Alone Under 18 U. S. C., Section 371 to Violate 18 U. S. C., Section 242 Be Sustained When, as Here, Both Petitioners Are Private Citizens Legally Incapable of Acting Under Color of Law in Violation of 18 U. S. C., Section 242?

It is conclusively established by the record of the case at Bar that each Petitioner was a private citizen incapable of acting under color of law. The jury convicted Petitioners of a conspiracy between themselves alone under 18 U. S. C., § 371 to violate 18 U. S. C., § 242 and acquitted the police officers who were the only defendants capable of violating § 242.

It seems appropriate here to restate the law as it appears in an unbroken line of authorities in respect to what is now 18 U. S. C., § 371 as applied to the case at Bar where neither Petitioner acting alone or in concert with the other are or were capable of violating 18 U. S. C., § 242. So long ago as 1870, just three years after the passage of the Federal conspiracy statute, Act of 1867, C. 169, Section 20, before which the crime denounced was unknown to Federal law, it was held in United States v. Martin, 26 Fed. Cas. 1175, Case No. 15,728, that the fact that one of the conspirators could not commit the intended offense neither relieves him of guilt nor disables him from conspiring with another person who is able to commit it.

A few of the many cases which sustained the foregoing statement are Cohen v. U. S. (1944—9th), 144 F. 2d 984, involving a private citizen and an officer of the selective service system; Downs v. U. S. (1925—3rd), 3 F. 2d 855, a civilian and a prohibition agent; Johnson v. U. S. (1907—5th), 158 F. 69, 72, a bankrupt and another; Jollit

v. U. S. (1923—5th), 285 F. 209, 213, a bankrupt and another; Curtis v. U. S. (1933—10th), 67 F. 2d 943, 946, a bank officer and another; U. S. v. Bayer (1876—Minn.), 24 Fed. Cas. 1046, Fed. Case No. 14,547, a conspiracy between a bankrupt and another; Carter v. U. S. (1927—8th), 19 F. 2d 431, a bankrupt and another; and Culp v. U. S. (1942—8th), 131 F. 2d 93, 99, which was an indictment under what is now, as at bar, 18 U. S. C., § 371, to violate 18 U. S. C., § 242. In **Culp**, speaking of one of the defendants, Jim Miller, a private citizen, the Court at p. 99 of the opinion said:

> "* * * That Jim Miller was not, and was not alleged to be, a state officer would not affect the validity of the indictment, since the fact that he could not commit the offense which was the alleged object of the conspiracy **would not prevent him from agreeing with those who could commit it that the offense should be committed** * * *" (Our emphasis).

This principle of law has been uniformly followed down through the years. The case of Brown v. United States (6th) 1953, 204 F. 2d 247, followed the principle previously established by this same Sixth Circuit that to sustain a conviction for conspiracy to violate 18 U. S. C., § 242 it is necessary that at least one of the co-conspirators possess the capacity to commit the offense denounced by § 242. In **Brown** the Sixth Circuit based its holding upon previous cases there decided, Chadwick v. United States, Sixth Circuit, 1905, 141 F. 225 and an earlier case so decided by the same Circuit, Scott v. United States, Sixth Circuit, 1904, 130 F. 429. That portion of the **Brown** opinion applicable to the case at Bar is as follows as it appears at 204 F. 2d 250:

> "A state law enforcement officer who, under color of state law, willfully and without cause arrests and imprisons an inhabitant of the United States for the purpose of extortion deprives him of a right, privi-

lege and immunity secured and protected by the Constitution of the United States and commits an offense defined under 18 U. S. C., § 242. An agreement between state law enforcement officers and others to engage in such extortion under color of state law is a conspiracy to violate § 242 under 18 U. S. C., § 371, Culp v. United States, 8 Cir., 131 F. 2d 93, 98.

The evidence established and the jury found that appellant was the prime mover in this system of extortion. It was carried on at his direction, for his benefit, and for a considerable period of time. The fact that appellant was a private citizen and legally incapable of violating § 242 does not render him immune from a charge of violating 18 U. S. C., § 371 by engaging in an agreement with a law enforcement officer acting under color of state law to violate 18 U. S. C., § 242. United States v. Holte, 236 U. S. 140, 145, 35 S. Ct. 271, 59 L. Ed. 504. As declared in Chadwick v. United States, 6 Cir., 141 F. 225, at page 237, opinion by Judge Lurton: 'It is sufficient if any one of the parties to a conspiracy is legally capable of committing the offense, although the other parties may not have been.' As was stated in United States v. Trierweiler, D. C., 52 F. Supp. 4, at page 7:

"'It is immaterial that they themselves may not have had the capacity to violate the statute for they became liable criminally *if they conspired to violate that statute and if one or more of their fellow conspirators had the capacity to commit the substantive offense.*' Barron v. United States, 1 Cir., 5 F. 2d 799, 801, 802; Haggerty v. United States, 7 Cir., 5 F. 2d 224, 225; Kaufman v. United States, 2 Cir., 212 F. 613, 618 (Our italics).

"In accord with this conclusion are Koehler v. United States, 5 Cir., 189 F. 2d 711; Apodaca v. United States, 10 Cir., 188 F. 2d 932.

"The presence of Colagross, who was a state officer, and his active cooperation with appellant furnished the color of law or 'pretense' of law, Screws v. United States, supra, 325 U. S. at page 111, 65 S. Ct. at page 1040, required as to appellant. United States v. Lynch, D. C., 94 F. Supp. 1011, affirmed, 5 Cir., 189 F. 2d 476, certiorari denied, 342 U. S. 831, 72 S. Ct. 50, 96 L. Ed. 629. Cf. Williams v. United States, 5 Cir., 179 F. 2d 656, 661, affirmed 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774."

The principal distinction between the **Brown** case and the case at Bar is that Brown's co-defendant was a Tennessee Deputy Sheriff who was convicted as a co-conspirator and who possessed the power and authority of a Sheriff and who acted under color of his office. Petitioners are private citizens incapable of acting under color of law.

The **Brown** case cites with approval the 1943 decision of United States v. Trierweiler, 52 F. Supp. 4. In **Trierweiler** the Court said:

"The amendment and the legislation are directed only against activities of the state and of its authorized agents. It does not create or add to the rights of one citizen as against another; it is, rather, a guaranty against encroachment by the state and its authorized agents upon the rights of the citizen under the Constitution of the United States. United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835; Hodges v. United States, 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65; United States v. Powell, C. C., 151 F. 648, affirmed 212 U. S. 564, 29 S. Ct. 690, 53 L. Ed. 653; United States v. Wheeler, D. C., 254 F. 611, affirmed 254 U. S. 281, 41 S. Ct. 133, 65 L. Ed. 270. **It follows, therefore, that if the indictment discloses that defendants acted in their individual capacity, or, stated otherwise, if it**

fails to aver that defendants acted under color of statutory authority, it is deficient." (Emphasis added.)

To the same effect are the cases of United States v. Lynch, 1950, 94 F. Supp. 1011, affirmed at 189 F. 2d 476, citing **Trierweiler**, the civil case of Whittington v. Johnston, 1953, 5th Circuit, 201 F. 2d 810, at p. 816, which also cites **Lynch** and **Trierweiler.**

The fifth headnote in Gebardi v. United States, 1932, 287 U. S. 112, 77 L. Ed. 206, 52 S. Ct. 648, is in this language:

"Where it is impossible under any circumstances to commit a substantive offense without cooperative action, the preliminary agreement to commit the offense is not an indictable conspiracy either at common law or under the Federal statute punishing conspiracy to violate a law of the United States."

The text of the opinion from which this headnote is taken appears at pp. 121, 122 of 287 U. S. and at p. 211 of 77 L. Ed. as follows:

"* * * If this were the only case covered by the Act, it would be within those decisions which hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, Shannon v. Com., 14 Pa. 226; Miles v. State, 28 Ala. 390; cf. State v. Law, 189 Iowa 910, 11 A. L. R. 194, 179 N. W. 145; see State ex rel. Durner v. Huegin, 110 Wis. 189, 243, 62 L. R. A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332, or under the federal statute. See United States v. Katz, 271 U. S. 354, 355, 70 L. Ed. 986, 46 S. Ct. 513; Norris v. United States (C. C. A. 3d), 34

F. (2d) 839, 841 (reversed on other grounds in 281 U. S. 619, 74 L. ed. 1076, 50 S. Ct. 424); United States v. Dietrich (C. C.), 126 Fed. 664, 667. * * *"

We paraphrase Headnote 5 of Gebardi as its statement of the law is applicable to the case at bar:

> "Where it is impossible under any circumstances for Lester and Buccieri as private citizens and acting alone to commit the substantive offense denounced by 18 U. S. C., § 242 without cooperative action by persons acting wilfully and under color of law (in the case at bar, Ciafardini, Quitter and White), the preliminary agreement to commit the offense is not an indictable conspiracy either at common law or under Federal statute punishing conspiracy to violate a law of the United States."

It must be conceded that petitioners acting alone could not be guilty of 18 U. S. C., § 242.

Under the statement of the law in **Gebardi** and keeping in mind the language of 18 U. S. C., § 242, requiring wilful acts under color of law, it is at once apparent that absent cooperative action by the police defendants, petitioners could not be guilty of the preliminary agreement (conspiracy) to commit the offense of 18 U. S. C., § 242, as alleged in the indictment.

Thus it is evident that the majority opinion of the Court in the case at Bar is in direct conflict with the cases of Barron v. United States, First Circuit, 5 F. 2d 799, 801, 802; Kaufman v. United States, Second Circuit, 212 F. 613, 618; Downs v. United States, Third Circuit, 3 F. 2d 855; Koehler v. United States, Fifth Circuit, 189 F. 2d 711; Johnson v. United States, Fifth Circuit, 158 F. 69; Brown v. United States, Sixth Circuit, 204 F. 2d 247; Chadwick v. United States, Sixth Circuit, 141 F. 225; Scott v. United States, Sixth Circuit, 130 F. 429; Culp v.

United States, Eighth Circuit, 131 F. 2d 93, 98; Carter v. United States, Eighth Circuit, 19 F. 2d 431; Cohen v. United States, Ninth Circuit, 144 F. 2d 984; Curtis v. United States, Tenth Circuit, 67 F. 2d 943; and Gebardi v. United States, 1932, 287 U. S. 112, 77 L. Ed. 206, 52 S. Ct. 648, each holding that private individuals are incapable of a Section 371 conspiracy to violate laws where special capacity is required, unless one or more of the co-conspirators possess the capacity to commit the substantive offense.

Research of counsel discloses no reported case where a conspiracy conviction was upheld against two or more persons, neither of whom was capable of committing the substantive offense, the object of the conspiracy, where no other person so capable was party to the conspiracy.

2. May a Conviction of Private Persons Under 18 U. S. C., Section 371, to Violate 18 U. S. C., Section 242, Be Sustained When It Was Conclusively Established That There Was a Total Absence of State Action?

(a) Was It Error to Refuse Instruction 20 Requested by Petitioners?

Instruction No. 20 requested by Petitioners as appears at p. 61 to the Appendix of this Petition should have been given to the jury. It required a finding by the jury of the essential elements of the offenses embodied in the two counts of the indictment; that is, state action by the police acting wilfully and under color of law, aided and abetted by Petitioners in respect to Count Two, and in respect to Count One that no conviction of Petitioners might be found unless the jury believed beyond reasonable doubt that the police conspired with them to violate § 242.

Section 242 of Title 18 by its language condemns wilful conduct under color of law. The statute is saved from

unconstitutionality under the Fourteenth Amendment by the requirement of the interposition of state action as held by this Court in the recent cases of United States v. Guest, March 28, 1966, 383 U. S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239, and United States v. Price, March 28, 1966, 383 U. S. 787, 86 S. Ct. 1152, 16 L. Ed. 2d 267.

In **Price** a unanimous Court held that to state an offense under § 241 or § 242 and § 371 to violate § 242, the indictment must allege "state action." In so holding its language is:

> "In view of the detailed opinions in Williams I, it would be supererogation to track the arguments in all of their intricacy. On the basis of an extensive re-examination of the question, we conclude that the District Court erred; that § 241 must be read as it is written—to reach conspiracies 'to injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . .'; that this language includes rights or privileges protected by the Fourteenth Amendment; **that whatever the ultimate coverage of the section may be, it extends to conspiracies otherwise within the scope of the section, participated in by officials alone or in collaboration with private persons**; and that the indictment in No. 59 properly charges such a conspiracy in violation of § 241. We shall confine ourselves to a review of the major considerations which induce our conclusion.
>
> 1. There is no doubt that the indictment in No. 59 sets forth a conspiracy within the ambit of the Fourteenth Amendment. Like the indictment in No. 60, supra, it alleges that the defendants acted **'under color of law'** and that the conspiracy included action by the State through its law enforcement officers to punish the alleged victims without due process of law

in violation of the Fourteenth Amendment's direct admonition to the States.

The indictment specifically alleges that the sheriff, deputy sheriff and a patrolman participated in the conspiracy; that it was a part of the 'plan and purpose of the conspiracy' that Deputy Sheriff Price, 'while having [the three victims] . . . in his custody in the Neshoba County Jail . . . would release them from custody at such time that he [and others of the defendants] . . . could and would intercept [the three victims] . . . and threaten, assault, shoot and kill them.'

This is an allegation of state action which, beyond dispute, brings the conspiracy within the ambit of the Fourteenth Amendment. It is an allegation of official, state participation in murder, accomplished by and through its officers with the participation of others. It is an allegation that the State, without the semblance of due process of law as required of it by the Fourteenth Amendment, used its sovereign power and office to release the victims from jail so that they were not charged and tried as required by law, but instead could be intercepted and killed. If the Fourteenth Amendment forbids denial of counsel, it clearly denounces denial of any trial at all.

As we have consistently held 'The Fourteenth Amendment protects the individual against **state action**, not against wrongs done by **individuals**.' Williams I, 341 U. S., at 92, 95 L. ed. at 772 (opinion of Douglas, J.). In the present case, the participation by law enforcement officers, as alleged in the indictment, is clearly state action, as we have discussed, and it is therefore within the scope of the Fourteenth Amendment.''

And, of course, proof must follow such allegation as allegation without such proof cannot be sustained.

In **Guest** the indictment was for conspiracy in violation of 18 U. S. C., § 241, accusing six private citizens. Section 241 in the part relevant in **Guest** reads:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . .
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years or both. June 25, 1948, C. 645, 62 Stat. 696."

No language in the statute requires state interposition, but there is implicit in all acts of Congress the mandates of the Constitution which in respect to **Guest** and at Bar are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws."

The only allegation of the indictment in **Guest** (by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts) alleging state action saved the indictment from being bad on demurrer or, as now practiced, from a motion to dismiss. This was the sole ground upon which the second numbered paragraph of the indictment was held to state an offense. So said Mr. Justice Stewart writing for the Court at pp. 248-249 of 16 L. Ed. 2d in these words:

> ". . . The allegation of the extent of official involvement in the present case is not clear. It may charge no more than co-operative private and state action similar to that involved in Bell, but it may go consid-

erably further. For example, the allegation is broad enough to cover a charge of active connivance by agents of the State in the making of the 'false reports,' or other conduct amounting to official discrimination clearly sufficient to constitute denial of rights protected by the Equal Protection Clause. Although it is possible that a bill of particulars, or the proofs if the case goes to trial, would disclose no co-operative action of that kind by officials of the State, the allegation is enough to prevent dismissal of this branch of the indictment."

Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Fortas, concurring in a separate opinion at 16 L. Ed. 2d 251, wrote:

"The appellees contend that the indictment is invalid since 18 U. S. C., § 241, under which it was returned, protects only against interference with the exercise of the right to equal utilization of State facilities, which is not a right 'secured' by the Fourteenth Amendment in the absence of State action. With respect to this contention the Court upholds the indictment on the ground that it alleges the conspiracy was accomplished, in part, 'by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts.' The Court reasons that this allegation of the indictment might well cover active connivance by agents of the State in the making of these false reports or in carrying on other conduct amounting to official discrimination. By so construing the indictment, it finds the language sufficient to cover a denial of rights protected by the Equal Protection Clause. The Court thus removes from the case any necessity for a 'determination of the threshold level that State action must attain in order to create rights under the Equal Protection

Clause.' A study of the language in the indictment clearly shows that the Court's construction is not a capricious one, and I therefore agree with that construction, as well as the conclusion that follows."

Mr. Justice Harlan at p. 252 of the report states his concurrence with Justices Stewart, Clark, Black, and Fortas in these words:

"I join Parts I and II of the Court's opinion, but I cannot subscribe to Part III in its full sweep. To the extent that it is there held that 18 U. S. C., § 241 (1964 ed.), reaches conspiracies, embracing only the action of private persons, to obstruct or otherwise interfere with the right of citizens freely to engage in interstate travel, I am constrained to dissent . . ."

Mr. Justice White, not being in dissent, obviously voted with the majority resulting in this term's pronouncement by six Justices of our Supreme Court that rights under Amendment XIV **"arise only when there has been involvement of the State or of one acting under color of its authority."**

We quote from **Guest** at 16 L. Ed. 2d 248:

"As Mr. Justice Douglas more recently put it, 'The Fourteenth Amendment protects the individual against **state action**, not against wrongs done by **individuals**.' United States v. Williams, 341 U. S. 70, 92; 95 L. Ed. 758, 772, 71 S. Ct. 581 (dissenting opinion). **This has been the view of the Court from the beginning.** United States v. Cruikshank, supra; United States v. Harris, 106 U. S. 629, 27 L. Ed. 290, 1 S. Ct. 601; Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 836, 3 S. Ct. 18; Hodges v. United States, 203 U. S. 1, 51 L. Ed. 65, 27 S. Ct. 6; United States v. Powell, 212 U. S. 564, 53 L. Ed. 653, 29 S. Ct. 690. **It remains the Court's view today.** See, e. g., Evans v. Newton,

382 U. S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486; United States v. Price, 383 U. S. 787, 16 L. Ed. 2d 267, 86 S. Ct. 1152."

In United States v. Price the first count of the indictment charged the Sheriff, Deputy Sheriff, and patrolmen together with private individuals with conspiracy to violate § 242, in the language of the statute similar to the first count of the indictment in the case at Bar.

The District Court held the indictment good on this count. No appeal was taken from the decision of the trial court with respect to the first count, and the matter was not before this Court for adjudication. However, the Court in referring to the first count of the indictment in the **Price** case stated:

> "On a motion to dismiss, the District Court sustained this First Count as to all defendants. As to the sheriff, deputy sheriff and patrolman, the court recognized that each was clearly alleged to have been acting 'under color of law' as required by § 242. As to the private persons, the District Court held that '[I]t is immaterial to the conspiracy that these private individuals were not acting under color of law' because the count charges that they were conspiring with persons who were so acting. See United States v. Rabinowich, 238 U. S. 78, 87, 59 L. Ed. 1211, 1214, 35 S. Ct. 682.
>
> "The court necessarily was satisfied that the indictment, in alleging the arrest, detention, release, interception and killing of Schwerner, Chaney and Goodman, adequately stated as the purpose of the conspiracy, a violation of § 242, and that this section could be violated by 'wilfully subject[ing] the victims to the deprivation of their right, privilege and immunity' under the Due Process Clause of the Fourteenth Amendment."

While it was immaterial to the conspiracy in the case at Bar that petitioners, private individuals, were not acting under color of law, but they could do so by conspiracy with the police officers, Section 242 could only be violated by the wilful acts of the police officers acting under color of law, and petitioners could only be guilty if they and the police officers conspired to violate the statute. But the police officer defendants and these petitioners were found not guilty of the substantive offense in Count Two of the indictment and the police officers were found not guilty under Count One of the indictment of conspiring with the petitioners.

No matter how guilty the police officers may appear to the Court from the evidence, the fact remains that they (the police officers) were found not guilty by the jury, both of the substantive offense and of the conspiracy to violate § 242. By the verdict no crime has been committed.

Speculation of the reasons for a jury's verdict of not guilty is but an abstraction. On p. 5 of the opinion (Appendix page 64), the Court intimates that the "evidence was ample to sustain a conviction of all defendants on both counts". The Court is not the trier of the facts and it cannot impeach a jury's verdict of not guilty. It is not believed that an impeachment of a jury's verdict of not guilty (as is done in the majority opinion) has been attempted since the year 1752 in the case of Rex v. Owen, 18 Howell, State Trials, 1203. This was a famous English prosecution for a criminal libel against Parliament, in which, although publication had been proved, the jury had found the defendant not guilty. The trial judge, at the insistence of the attorney for the Crown, asked the jury whether they had found the defendant not guilty "because publication had not been proved". The answer of the jury has become a classic. Through the foreman, they answered: "Not guilty, not guilty. That is our verdict, my Lord, and we abide

by it." One familiar with the law of criminal libel as it then stood, can understand the importance of the answer and the courage of the jury in giving it. Truth was not a defense. And when publication was proved, the offense was complete. Had the jurors answered the Court's question affirmatively, their answer could have been considered a special verdict, and the verdict of not guilty nullified. Had they answered it negatively, they would have stood impeached. For publication had been proved. By giving this courageous answer, these twelve men, who, as the record of the case shows, were drapers and other tradesmen, not only saved their verdict but wrote a glorious incident in the history of trial by jury in the English-speaking world, and in the history of free speech.

As Judge O'Sullivan stated in his dissenting opinion at page 12:

> "The alleged plan to violate § 242 involved no one capable of committing the proscribed act. The officers, as long as they were innocent dupes could not arrest Ratterman **wilfully and without probable cause**; the petitioners, as civilians, could not, acting under color of law, arrest Ratterman at all." (Emphasis added.)

And again at page 13 of Judge O'Sullivan's opinion:

> "The jury verdict can mean only that the offense described in § 242 was not committed. Therefore, no one **caused 'an act to be done'** which was 'an offense against the United States'." (Emphasis added.)

At page 16 of the dissenting opinion, Judge O'Sullivan, quoting from **Guest**, said:

> "Although it is possible that a bill of particulars, or the proofs if the case goes to trial, would disclose

no cooperative action of that kind by officials of the state, the allegation is enough to prevent dismissal of this branch of the indictment."

At page 16, Judge O'Sullivan in his dissent, quoted from the partial dissent of Mr. Justice Brennan of his understanding of the majority holding in **Guest:**

> "I understand this to mean that no matter how compelling the proofs that private conspirators murdered, assaulted, or intimidated Negroes * * * the prosecution under the second numbered paragraph must fail, in the absence of proofs of active **connivance** of law enforcement officers with private conspirators in causing the false arrests." (Emphasis added.)

We have emphasized the word "connivance" as used by Mr. Justice Brennan and we call the Court's attention to the definition of connivance as being "an agreement or consent, indirectly given, that something unlawful shall be done by another." Bouvier's Law Dictionary, Third Revision, states that connivance necessarily involves criminality on the part of the individual who connives. Applying the Justice's understanding of **Guest** to the case at bar, of necessity the police would have had to have acted wilfully and under color of law as opposed to the majority opinion that they could have been "innocent dupes." The term "connivers" is the antithesis of "innocent dupes."

Paraphrasing the Justice's comment it might be said:

> "I understand this to mean that no matter how compelling the proofs that private conspirators engaged among themselves that they would subject an inhabitant of Kentucky to the deprivations of any rights or immunities secured or protected by the Constitution or laws of the United States, the prose-

cution under Count 1 of this indictment must fail, in the absence of proofs of active connivance of law enforcement officers with private conspirators."

Proof of the offense must follow the allegation as allegation without proof thereof is as abortive as proof without allegation. An indictment alone is not sufficient. Proof must follow and the offense must be established. In this case it was not.

The court's refusal of Petitioners' offered instruction permitted the jury, as it did, to find that no defendant violated 18 U. S. C., § 242, that no person capable of acting under color of law conspired with anyone in violation of 18 U. S. C., § 371, **but to further find that Petitioners by agreement only between themselves could be found guilty of conspiracy without any action upon their part under color of law.**

The indictment alleges the object of the conspiracy to be a violation of 18 U. S. C., § 242, that is, the commission of the substantive offense which could not be committed by Petitioners acting alone as private citizens. By the jury verdicts it is conclusively established that no person whomsoever acting under color of law committed any offense. So the verdict here lacks any support in the evidence that any act under color of law was done, or any agreement between Petitioners was entered into by them to act under color of law. If Petitioners conspired at all it could only be to perform an impossibility.

Had petitioners' offered instruction No. 20 been given, the incongruous verdict finding petitioners guilty of conspiracy between themselves could not have been returned. We submit that it was reversible error to refuse the request.

Thus it is evident that the majority opinion of the case at Bar is in direct conflict with the above cases of United

States v. Guest, 383 U. S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239, and United States v. Price, 383 U. S. 787, 86 S. Ct. 1152, 16 L. Ed. 2d 267.

3. May 18 U. S. C., Section 2 Be Applied to 18 U. S. C., Section 371 to Sustain a Conviction of Petitioners as Private Persons Convicted Under Section 371 to Violate Section 242, Where No Person Acting Wilfully Under Color of Law and Capable of Violating Section 242 Conspired With Those Convicted, and Where Upon Count Two of the Same Indictment the Jury's Verdict of Not Guilty Conclusively Established That There Was No Violation of Section 242 or Section 2?

(a) Function of 18 U. S. C., § 2 (a) (b).

(b) In Every Criminal Offense Must There Be a Principal Capable of Committing the Offense?

Petitioners, private individuals, were convicted of conspiracy pursuant to 18 USC, § 371, to violate 18 USC, § 242. There were no police officers or anyone capable of acting under color of law found guilty of conspiracy with petitioners. Admittedly there was no evidence of the existence of "persons unknown", who acted under color of law. Petitioners together with three police officers and another private individual were acquitted and found not guilty of the violation of the substantive offense denounced by 18 USC, § 242, and of the offense denounced by 18 USC, § 2 (a) (b). Thus petitioners, private individuals, stand alone convicted of conspiracy to violate 18 USC, § 242.

The entire thrust of the Government's theory to sustain this conviction was bottomed upon the claimed application of 18 USC, § 2 (a) (b), to 18 USC, § 371, in that it was argued that two private individuals can conspire to cause innocent police officers (who have been found not

guilty of the charge of conspiracy) to act innocently to commit a violation of § 242.

Title 18, U. S. C., § 2 (b), was amended in 1951. However, the amendment did not enlarge criminal liability but is merely a restatement of existing law. Pereira v. United States (1953—5th), 202 F. 2d 830, at p. 837:

> "* * * In that respect, Section 2 (b) does not enlarge criminal liability, but is merely a restatement of existing law. See United States v. Paglia, 2 Cir., 190 F. 2d 445, 448; United States v. Chiarella, 2 Cir., 184 F. 2d 903, 909, 910. * * *"

Petitioners were found not guilty of violation of the substantive offense denounced by 18 U. S. C., § 242, and the offense denounced by 18 U. S. C., § 2 (a) (b). The majority opinion has upheld the conviction of these private individuals on the theory that they have violated 18 U. S. C., § 2 (a) (b), by agreeing to cause innocent police officers to violate § 242. When an individual has been acquitted, there can be no presumption or assumption of his guilt on that particular offense. In fact, there is always a presumption of innocence, until one is proven guilty beyond a reasonable doubt.

To sustain the judgment below the majority opinion discusses and at p. 6 quotes the aider and abettor statute which reads:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal. (and)
>
> "(b) Whoever wilfully causes an act to be done which if directly performed by him *or another* would be an offense against the United States, is punishable as a principal." (Italics added.)

and states that petitioners' argument that as private citizens they were incapable of acting under "color of law"

and hence were incapable of the offense defined in § 242 they could not be guilty of conspiring to commit a violation of § 371, misconceives the function of this aider and abettor statute. It is respectfully submitted that the Court in the majority opinion has, rather than petitioners, misconceived the function of the statute.

Preliminary to a discussion of the function of this statute, 18 U. S. C., § 2, petitioners again point out that they have been acquitted of its violation. See Count Two of the indictment at p. 58 of Appendix of Petitioners where the concluding words of the accusation of "all in violation of Title 18, United States Code, § 242 and § 2."

In the light of the acquittal upon Count Two, the language at pp. 6-7 of the opinion that an indictment need not specifically charge "aiding and abetting" or "causing" the commission of the offense in order to support a jury verdict based upon a finding of either, is but academic. Here the charge under this statute that petitioners either aided, or abetted, or counseled, or commanded, or induced, or procured the commission of an offense against the United States has been answered in the negative by the jury's verdict of "Not Guilty".

So also under (b) of the statute the charge that petitioners caused an act to be done, which if directly performed by them, or either of them, or another would be such offense, has been similarly answered by the verdict of "Not Guilty".

The Court further states on p. 6 of the opinion that:

> "In keeping with the provisions of § 2, it has long been held that an indictment need not specifically charge 'aiding and abetting' or 'causing' the commission of an offense against the United States in order to support a jury verdict based upon finding of either."

This is a general statement of the law with which petitioners have no quarrel, except in the majority opinion's application of it to the case at Bar. The petitioners were found not guilty of the charge of § 2 (a) (b) of aiding and abetting or causing the commission of an offense against the United States. They were as private citizens found guilty of a conspiracy to violate § 242 without a co-conspirator capable of violating § 242. **Title 18, § 2 (a) (b), is not applicable to a conspiracy.** Conspiracy is not a substantive offense. It is dependent upon an agreement to commit the substantive offense. To aid or abet, counsel or command, procure or cause one or another to commit a crime does not presuppose the existence of a conspiracy.

The majority opinion further states at p. 6:

> "All indictments must be read in effect, then, as if the alternatives provided by 18 U. S. C., § 2, were embodied in each count thereof."

To support the foregoing statement the Court cites the cases of Nye & Nisson v. United States, 336 U. S. 613, 619 (1949); Remus v. United States, 291 F. 513 (Sixth Circuit, 1923); and Fed. R. Crim. P. 7 (c). Neither of these cases nor does the rule in any manner hold or provide that § 2 must be considered as embodied in a charge of conspiracy and they are not authority for what the majority opinion states to be the law. In fact there is no authority for such holding. **Nye & Nisson** involved an indictment for defrauding the United States and conspiracy under § 371 to defraud the United States. Here it must be observed that any person or persons whomsoever could be guilty of defrauding the United States and accordingly could be guilty of conspiring to defraud the United States. Its further holding is that one who aids and abets the commission of a **completed offense** is guilty as a principal. That is not the case at bar. No offense under § 242 and § 2 was committed. The **Remus** case was one involving the

offense of maintaining a nuisance, a misdemeanor, wherein the completed offense of maintaining the nuisance was established by abundant proof. The proof against Remus was that he aided and abetted the maintenance of a nuisance and, of course, was under the indictment a principal. Under the statute in **Remus** any one could be guilty of maintaining a nuisance whether he did so alone or with others. But to be guilty of aiding and abetting in **Remus** the government was required to and did show that the completed offense of maintaining a nuisance was committed. At bar, the offense denounced by § 242 and § 2 was conclusively shown to have not been committed.

There are three separate and distinct classes of crimes; namely, (1) completed substantive offenses; (2) aiding, abetting or counseling another to commit them; and (3) conspiracy to commit them. See Pinkerton v. United States, 1945, 238 U. S. 640, at p. 1497 of 90 L. Ed. Each of these crimes requires different elements of proof. Pereria v. United States, 1954, 347 U. S. 1, 74 S. Ct. 358, at p. 445 of 98 L. Ed. wherein it was held that aiding and abetting, and counseling are not terms which presuppose the existence of an agreement. It must follow that causing an act to be done, which if performed directly by petitioners, or another, does not and could not presuppose the existence of an agreement which is the gist of a conspiracy. However, in the instant case the offense denounced in § 242 was not committed. Therefore, no one caused an act to be done which was an offense against the United States and § 2 can have no application. See dissenting opinion at p. 13 (Appendix page 72).

The majority opinion, if sustained in respect to § 2 (a) (b), would eliminate the burden of proving the agreement by merely establishing an aiding, abetting or causing § 242 to be violated.

In a criminal conspiracy the conspiracy is the gist of the crime. Hoffman v. Halden (1959), 268 F. 2d 280, and

other cases cited, and Note 17 on p. 295 of that case. And the function of the overt act is to show that the agreeing or conspiring has progressed from the field of thought and talk into action. It completes the offense. See Note 18, p. 295 of **Hoffman v. Halden.** Without an agreement there can be no conspiracy. To violate § 242, Title 18, U. S. C., there must be color of law, in the instant case, a conspiracy with a police officer. It is ridiculous to assume that the acquitted officers agreed to conspire, they were found not guilty of the substantive count and not guilty of the conspiracy count. **If the police officers did not conspire with petitioners, how could petitioners conspire with the police officers?** In the absence of a conspiracy with police officers, there is no color of law.

As stated by the dissent at bar at p. 13 (Appendix page 72), § 2, is merely a codification of the familiar common law principle and it follows that its meaning and application here, if indeed it applies at all (which petitioners deny), must be governed by the principles of the common law as understood and applied in the national courts as distinguished from those of the states. This is of necessity so because there can be no crimes against the United States except those denounced by statutes. Thus it has been held by the Supreme Court in United States v. Mills, 1833, 7 Pet. 138, 8 L. Ed. 636, that where the offense charged in an indictment is a misdemeanor, as here, all accused are principals and the doctrine applicable to principal and accessory in case of felony does not apply. But in **Mills** the specific holding was that the indictment must allege that the offense alleged against the chief actor (principal) **had in fact been committed.** And it, of course, follows that proof of the offense must follow the allegation **as allegation without proof thereof is as abortive as proof without allegation.** Stated another way as Judge Hutcheson of the Fifth Circuit did in Grimsley v. United States (1931), 50 F. 2d 509, 511:

"I have always supposed that as an indictment without proof cannot support a conviction, so proof without indictment cannot."

Although the former technical distinction between the applicability of the law of aiders and abettors in respect to misdemeanors as distinguished from felonies has probably now been abolished by statute, yet in effect the former law was but a distinction without a difference. This is so because in either the offense **must be alleged and proven to have been committed to sustain a conviction.** So said the Supreme Court in **Mills** and where felony was alleged against Aaron Burr for aiding and abetting, Chief Justice Marshall sitting in Circuit with Judge Griffin in the District of Virginia, August 31, 1807, reported in 25 Fed. Cas. 177-178, Case No. 14,693, 2 L. Ed. 700, 701, pronounced by the Court these principals, *inter alia,* of the law of aiders and abettors:

"It is a settled principle in the law that the accessory cannot be guilty of a greater offense that his principal. The maxim is *accessorius sequitur naturam sui principalis;* the accessory follows the nature of the principal. Hence results the necessity of establishing the guilt of the principal before the accessory can be tried. For the degree of guilt which is incurred by counselling or commanding the commission of a crime depends upon the actual commission of that crime. No man is an accessory to murder unless the fact has been committed.

The fact can only be established in a prosecution against the person by whom a crime has been perpetrated. The law supposes a man more capable of defending his own conduct than any other person, and will not tolerate that the guilt of A. shall be established in a 504*] prosecution *against B. Consequently, if the guilt of B. depends on the guilt of A., A. must be convicted before B. can be tried. It would

exhibit a monstrous deformity, indeed, in our system, if B. might be executed for being accessory to a murder committed by A. and A. should afterwards, upon a full trial, be acquitted of the fact. For this obvious reason, although the punishment of a principal and accessory was originally the same, and although in many instances it is still the same, the accessory could, in no case, be tried before the conviction of his principal, nor can he yet be tried previous to such conviction, unless he requires it, or unless a special provision to that effect be made by statute.

If, then, this was a felony, the prisoner at the bar could not be tried until the crime was established by the conviction of the person by whom it was actually perpetrated.

Is the law otherwise in this case, because, in treason all are principals?

Let this question be answered by reason and by authority.

Why is it that in felonies, however atrocious, the trial of the accessory can never precede the conviction of the principal? Not because the one is denominated the principal and the other the accessory, for that would be ground on which a great law principle could never stand. Not because there was, in fact, a difference in the degree of moral guilt, for in the case of murder committed by a hardy villain for a bribe, the person plotting the murder and giving the bribe, is, perhaps, of the two the blacker criminal: and, were it otherwise, this would furnish no argument for precedence in trial.

What, then, is the reason?

It has been already given. The legal guilt of the accessory depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself."

So it is seen that from earliest times there can be no conviction of an aider or abettor absent allegation and proof of the principal's guilt, or, stated another way, allegation and proof must be made of a completed crime before there can be a violation of § 2. Section 242 is in effect similar to § 656 of Title 18, U. S. C. Each limits the class of persons who can violate their provisions. Private individuals alone cannot violate either. Under certain conditions private individuals may be capable of aiding, abetting, or causing a violation of either statute and may also be capable of conspiracy to violate either statute. However, to aid, abet, cause, or conspire the guilt of a principal actor or co-conspirator capable of violating either statute, must be established, otherwise no crime has been committed.

So it was required of the Government to prove that Petitioners conspired to and with the police acting under color of law and wilfully to deprive Ratterman of certain rights. So, it is charged in the indictment.

At page 7 of the opinion at bar it is said:

> ". . . For it was held long ago that even though 'a defendant was incompetent to commit the offense as principal by reason of not being of a particular age, sex, condition, or class, he may, nevertheless, be punished as a procurer or abettor.' (United States v. Snyder, 14 Fed. 554, 556 (C. C. D. Minn. 1882).)
>
> "This doctrine is an outgrowth of common law principles of criminal responsibility dating at least as far back as Regina v. Saunders, 2 Plowd. 473 (1575); and of principles of civil responsibility established, by force of the maxim *qui facit per alium facit per se*, at least as early as the 14th century. (See: **United States v. Gooding**, 25 U. S. (12 Wheat.) 460 (1827); **Sayre, Criminal Responsibility for the Acts of Another**, 43 Harv. L. Rev. 689 (1930).)"

Petitioners cannot refute this statement. It has always been the law that one incapable of committing an offense may yet be guilty of procuring or abetting its commission. **But this presupposes that the offense has in fact been committed. At bar it was not.** There are no aiders or abettors or procurers in misdemeanors. All are principals. And who would say that there could be a principal in a non-existent crime? And upon this record, whom did petitioners aid or abet or counsel or procure or cause to commit an offense against the United States? The jury said "No One."

In the **Snyder** case cited by the Court the offense charged was the filing by a postmaster of a false return to the Post Office Department and that Snyder's co-defendant, Bertram, aided and abetted Snyder, the postmaster. The principal witness against Bertram was Snyder through whom the government established the completed offense of filing the false return. The conviction against Bertram as an aider and abettor was upheld but only because it was shown that the completed offense of the filing of a false return by the postmaster had in fact been done. This **Snyder** case cannot support the majority opinion.

In the old English case of Regina v. Saunders, it appeared that Saunders, wishing to kill his wife, confided in his friend Archer, who advised him to poison her and procured and gave to him the necessary poison. This Saunders inserted in a roasted apple, which he gave to his wife; his wife gave the apple to their three-year-old daughter who ate it in Saunder's presence, he being unable to stop her lest he be suspected. Upon the death of the daughter, Saunders was charged as principal and Archer as accessory to the murder. Saunders was convicted; the real problem arose as to Archer. "For the Offense which Archer committed was the Aid and Advice which he gave to Saunders, and that was only to kill

his Wife, and no other," reads the report. "Archer did not precisely procure her Death, nor advise him to kill her, and therefore whether or no he should be Accessory to this Murder which happened by a Thing consequential to the first Act, seemed . . . doubtful." The judges finally, however, with evident reluctance, concluded that there could be no conviction, because Archer's "assent cannot be drawn further than he gave it, for the poisoning of the Daughter is a distinct Thing from that to which he was privy, and therefore he shall not be adjudged Accessory to it."

It is to be noted that in this opinion delivered by the Chief Justice of the Common Bench in the eighteenth year of the reign of Queen Elizabeth the alleged accessory, or aider and abettor, Archer, was acquitted by the court.

Nor does the **Gooding** case lend support to the majority holding. We refer the Court to Page 696 of the report of the case in 6 L. Ed.:

> "* * * On the contrary, it is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, **if it is done**, is guilty of the crime, and the act is his act * * *" (emphasis ours).

This quotation from **Gooding** is almost in the same language of **Mills**, supra.

Each of the cases of **Snyder**, **Saunders** and **Gooding** support the position of petitioners.

At p. 9 of the Court's opinion, it is written:

> "We can perceive no basis in reason or policy to distinguish **a case of willfully causing innocent police officers**, 'acting under color of law', to deprive another of his civil rights, from a case of willfully causing an

> innocent bank clerk to mail a fraudulently obtained check (**Pereira v. United States**, *supra*, 347 U. S. 1), or causing a lender to make a false report of prices paid for homes (**United States v. Selph**, *supra*, 82 F. Supp. 56), or causing a union representative to receive money unlawfully from employers (**United States v. Inciso**, *supra*, 292 F. 2d 374), or causing a licensed dealer in firearms to fail to maintain required records (**United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle**, *supra*, 250 F. Supp. 410)."

But in **Pereira** the bank clerk mailed the check, in **Selph** the false report of prices paid for homes was made, in **Inciso** the union unlawfully received money from the employers. Only in **Pereira** was conspiracy alleged, and it was to violate the mail fraud statute and in each case relied upon by the Court the **ultimate offense was committed.** At bar no offense under § 242 or § 2 was committed and the acquittal of the police conclusively established the absence of "state action and wilfulness" required by the statute **and the Constitution.**

The case of the Military Rifle, 250 F. Supp. 410, relied upon in the majority opinion, has been reversed by the Fifth Circuit on July 29, 1966, in Case No. 23637 under the title King v. United States (not yet reported at the time of the preparation of this Petition) and in the opinion which interprets 18 U. S. C., § 2 the Court said:

> "The principle that one cannot be guilty of aiding and abetting the commission of an offense unless another person has committed a criminal violation seems well-reasoned. It is also well-supported by authority. E. g., Shuttlesworth v. Birmingham, 373 U. S. 262 (1963); Edwards v. United States, 286 F. 2d 681 (5 Cir. 1960)."

Petitioners quote from Von Patzoll v. United States (1947—10th), 163 F. 2d 216, at p. 219 where it is said:

"The proof must establish that the offense was committed by some one and that the person charged as an aider and abettor, aided and abetted in its commission. However, it is not necessary to identify the actual perpetrator of the crime. He may be unknown."

Similarly in Hernandez v. United States (1962—9th), 300 F. 2d 114, at pp. 123-124 it is said:

"* * * Further, conviction as an aider and abettor requires proof that the crime has in fact been committed by the principal. * * *"

So also it was said in the Tenth Circuit Court in 1952, Colosacco v. United States, 196 F. 2d 165, at p. 167:

"While conviction of the principal is not a prerequisite to the conviction of the aider and abettor, the proof must establish beyond a reasonable doubt that the offense was committed by someone and that the person charged as an aider and abettor aided and abetted in its commission."

That the majority opinion misconceives the function of 18 U. S. C., § 2 (a) (b) is most forcefully illustrated by the case of United States v. Tornabene (3rd Cir., 1955), 222 F. 2d 875, involving an indictment under 18 U. S. C., § 656. The Government contended in **Tornabene** that the indictment could be read to charge either a violation under § 656 or a violation under § 2 (a). Neither of the appellants in that case was capable of an offense under § 656 since the statute limited the class of persons who could violate its provisions to bank personnel. In ordering a reversal of the conviction of appellants and quashing the indictment the Court said:

"We will first consider whether Count 1 charges a crime under Section 656. That section distinctly limits the class of persons who can violate its pro-

visions, i. e., officers, directors, agents, employees, etc. See United States v. Weitzel, 1918, 246 U. S. 533, 38 S. Ct. 381, 62 L. Ed. 872. The government concedes this much. It is not alleged that either Caplan or Tornabene fall within any of the designated classes. But this does not end the matter, according to the government.

The government says that since Section 2 (a) is not confined to a limited class, both Caplan and Tornabene were capable of aiding and abetting in a violation of Section 656. So far, the government is correct, Coffin v. United States, 1895, 156 U. S. 432, 15 S. Ct. 394, 39 L. Ed. 481, and with this phase of the government's theory, the appellants agree.

The government then argues that if A can commit a crime by aiding and abetting B in doing an act, it is sufficient to indict A for doing the principal act, even if at trial the proof shows that A only aided and abetted in the commission of the act which constituted the crime. As an abstract principle, this is good law, and we have been referred to many cases relied upon by the district court and cited by the government, i. e., United States v. Klass, 3 Cir., 1948, 166 F. 2d 373; Von Patzoll v. United States, 10 Cir., 163 F. 2d 216, certiorari denied 1947, 332 U. S. 809, 68 S. Ct. 110, 92 L. Ed. 386; DiPreta v. United States, 2 Cir., 1920, 270 F. 73.

But there is a distinct and essential difference between this case and those to which we have been referred. In all those cases, the defendant was capable of committing the crime as well as aiding and abetting in its commission. Thus, an indictment against A for mail fraud is valid because it charges a crime, and it is well settled that no fatal variance occurs if only aiding and abetting another in committing mail fraud is proved at trial, since an aider and abettor can be treated as the principal. The theory of this

doctrine is sound, because if a grand jury has indicted A for mail fraud, the grand jury has charged a crime, and the indictment on its face is good.

But here, if the indictments are read as charging Caplan and Tornabene with willful misapplication of bank funds, no federal crime is charged. They alone cannot violate Section 656, as it is not alleged that they were members of the designated class under this section.

But, as the appellants concede, the indictment is sufficient if it charges them with aiding and abetting a bank official in committing the crime. This brings us to the second government theory—namely, that the indictments are sufficient because they adequately charge appellants with aiding and abetting under Section 2 (a).

An indictment is not sufficient unless it charges all essential elements of a crime. Essential to the crime of aiding and abetting a bank official in violating Section 656 is the guilt of the bank official. See United States v. Pyle, S. D. Cal. 1921, 279 F. 290, 293. Without this element, there is no crime, so far as the federal government is concerned, for if no designated person who falls within the Section 656 classification has violated the section, then no one can be guilty of aiding and abetting.

The majority opinion in respect to § 2 is that the police defendants were the actors (principals) and petitioners the aiders and abettors, or, as in **Mills**, their conduct is secondary in character. But if the alleged actors committed no offense, the petitioners could not have aided or abetted them or **caused them to act.** The verdict here, as Judge O'Sullivan's dissent points out, "denies the existence of the essential facts." Page 14 of Judge O'Sullivan's dissenting opinion.

The case of United States v. Johnson (U. S. D. C., D. Md., 1963), 215 F. Supp. 300, contains a footnote on p.

314 citing the **Tornabene** and other cases with the statement that "a charge against an alleged aider and abettor must fall if no sufficient charge is made against the principal."

Another case involving aiding and abetting under § 2 in violation of § 656 is that of Giragosian v. United States (1965—1st), 349 F. 2d 166, where the Court said at pp. 167-168:

> "Since Giragosian was not an officer, director, agent or employee of the bank, he could not be guilty as a principal under 18 U. S. C., § 656 for misapplication of the bank's funds, but only as an aider and abettor. Logsdon v. United States, 253 F. 2d 12, 14 (6th Cir. 1958); United States v. Tornabene, 222 F. 2d 875, 878 (3d Cir. 1955); United States v. Pyle, 279 F. 290 (S. D. Cal. 1921). In order to convict Giragosian of aiding and abetting it was necessary for the Government to prove that Page himself was guilty of the primary offense, that is, that he willfully misapplied the bank funds. Coffin v. United States, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109 (1896); United States v. Fromen, 265 F. 2d 702, 705 (2d Cir.), cert. denied, 360 U. S. 909, 79 S. Ct. 1295, 3 L. Ed. 2d 1260 (1959); United States v. Tornabene, supra; United States v. Pyle, supra. While there can be no doubt that there was abundant evidence to support a finding that Giragosian was guilty of aiding and abetting the misapplication of bank funds if Page was guilty of the substantive offense, in our view the evidence was wholly insufficient to warrant the jury in concluding beyond a reasonable doubt that Page was guilty of a willful misapplication of the bank's funds in violation of 18 U. S. C., § 656."

Paraphrasing the language of **Giragosian** as its principle of law here applies it could be said:

"Since petitioners as private citizens possessed no capacity to act wilfully under color of law, they could not be guilty as principals under 18 U. S. C., § 242, but only as aiders and abettors. In order to convict petitioners it was necessary for the government to prove that the police themselves were guilty of the primary offense, that is, that the police acted wilfully and under color of law in violation of § 242."

In the case of United States v. Pihakis (1955—3rd), 224 F. 2d 898, the Court relied upon its earlier decision in **Tornabene** to quash the first two counts of the indictment.

The principle announced in **Tornabene** was approved in 1957 by the Seventh Circuit in Banks v. United States, 239 F. 2d 409.

The **Tornabene** case cites United States v. Pyle (S. D. Cal., S. D.—1921), 279 F. 290. This case contains a detailed analysis of the Supreme Court case upon which it relies, that is, Coffin v. United States (1896), 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109. One of the Court's reference to **Coffin** appears at 279 F. 294 in this language:

"On page 672 of 162 U. S. (16 Sup. Ct. 943, 40 L. Ed. 1109) it is stated that repeatedly the jury were told that they could not find the defendants (the two aiders and abettors) guilty unless they were satisfied beyond a reasonable doubt that Haughey and the defendants had committed the specific criminal acts alleged in the counts of the indictment with the intent therein charged. It is said (162 U. S. on page 675, 16 Sup. Ct. 948, 40 L. Ed. 1109), and in considering the instructions just noted:

'The charge as a whole having correctly conveyed to the jury the rule by which they were to determine from all the evidence the question of intent, we think there was no error to the prejudice of the defendant,' etc.

> "This is undoubtedly an affirmance by the Supreme Court of the correctness of the charge of the court below in the behalf indicated that the jury could not convict the abettor unless they found the principal, the bank official, had committed the criminal act charged against him."

It would appear from the majority opinion on Page 9 where it states:

> "Nor do we discern any rationale for refusing, as appellants suggest, to apply the conspiracy statute [18 U. S. C., § 371] to crimes made punishable by 18 U. S. C., § 2 (b). So long as anyone who 'willfully causes an act to be done' which, 'if directly performed by him or another would be an offense against the United States,' is punishable as a principal, it follows *a fortiori* that when two or more persons conspire willfully to 'cause' an act forbidden by § 2 (b), they *ex necessitate* conspire to 'commit [an] offense against the United States' within the meaning of 18 U. S. C., § 371."

that because § 2 (a) (b) fixes punishment as a principal for an aider and abettor that the requisite necessity for a guilty principal is obviated. But the Supreme Court in **Coffin** at 40 L. Ed. 1112, held in language necessary to its decision that:

> "In every criminal offense there must, of course, be a principal, and it follows that without the concurring act of an officer or agent of a bank, third persons cannot commit a violation of the provisions of § 5209."

On July 29, 1965, less than a year before the opinion at Bar, Judge Weick, writing for the Sixth Circuit in United States v. Hoffa, 349 F. 2d 20 at p. 40 reiterated the principle of **Mills** and **Gooding** in these words:

"Before Hoffa could be convicted as an aider and abettor, however, it was necessary for the Government to prove that the principal, Medlin, committed the crime. Shuttlesworth v. City of Birmingham, 373 U. S. 262, 265, 83 S. Ct. 1130, 10 L. Ed. 2d 335 (1963); Hendrix v. United States, 327 F. 2d 971, 975 (C. A. 5, 1964); Edwards v. United States, 286 F. 2d 681 (C. A. 5, 1960); Karrell v. United States, 181 F. 2d 981 (C. A. 9, 1950).

* * * * * * * *

"After establishing that a crime had been committed, the Government had the burden to connect Hoffa with it as an aider and abettor."

In the case of Shuttlesworth v. Birmingham, 373 U. S. 262, 10 L. Ed. 2d 335, 83 S. Ct. 11, the Court said:

"Petitioners were convicted for inciting, aiding, and abetting a violation of the city trespass ordinance. The trespass "violation" was that committed by the petitioners in Gober v. Birmingham, 373 U. S. 374, 10 L. Ed. 2d 419, 83 S. Ct. 1311. Since the convictions in Gober have been set aside, it follows that the present petitioners did not incite or aid and abet any crime, and that therefore their own convictions must be set aside.

It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act."

The teaching of **Shuttlesworth** that one may not be guilty of aiding, abetting, or inciting the performance of an innocent act may be appropriately applied to the case at Bar. The complaint against Shuttlesworth was dismissed because those whom he was accused of aiding, abetting, and inciting were not in violation of law. So here, 18 U. S. C., § 2, is inapplicable because the police and all accused were found not guilty of violating § 242,

and the police were found not guilty of conspiring with petitioners to violate § 242, and the police officers being innocent of any infraction of the law, petitioners could not have aided or abetted them, or caused an act to be done.

The case of Parr v. United States, 1960, 363 U. S. 370, 4 L. Ed. (2) 1277, 80 S. Ct. 1171, reflects an indictment of 20 counts, 19 of which were for violation of 18 U. S. C., § 1341. The court held that the conduct of defendants as reflected by the evidence did not constitute a violation of § 1341, the mail fraud statute, and that therefore the conviction on Count 20 for conspiracy to violate § 1341 could not stand. At 363 U. S., p. 393, 4 L. Ed. (2) 1292, the opinion reads:

> "Inasmuch as the twentieth count charged petitioners with conspiring to commit the offense complained of in Count 1, and inasmuch as, on the facts of this record, the count cannot be sustained, it follows that petitioners' convictions upon the twentieth count cannot stand."

Headnote 14 of the case from which the above quoted words are taken is:

> "A conviction of conspiracy to commit a substantive offense cannot stand where, on the facts presented, the count of the indictment charging the substantive offense in question cannot be sustained."

In the case at bar the jury determined that upon the evidence there has been no violation of 18 U. S. C., § 242, by anyone, and no violation by any police officer under 18 U. S. C., § 371. It would seem that the ultimate fact to be found is whether there was upon the evidence a violation of the substantive offense, whether, as here, by the jury, or as in **Shuttlesworth** and **Parr** by the court. The only distinction is without a real difference. In either

case the count charging conspiracy to violate the substantive offense cannot be sustained and by the holding in Shuttlesworth and Parr the conspiracy count must fail.

Thus it is evident that the majority opinion of the Court in the case at Bar is in direct conflict with the cases of United States v. Gooding, 1827, 25 U. S. 460, 12 Wheat. 460; United States v. Mills, 1833, 7 Pet. 138, 8 L. Ed. 636; Shuttlesworth v. Birmingham, 1963, 373 U. S. 262, 10 L. Ed. 2d 335, 83 S. Ct. 1130; Parr v. United States, 1960, 363 U. S. 370, 4 L. Ed. 2d 1277, 80 S. Ct. 1171; Coffin v. United States, 1896, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109; Giragosian v. United States, 1965, First Circuit, 349 F. 2d 166; United States v. Pihakis, 1955, Third Circuit, 224 F. 2d 898; United States v. Tornabene, 1955, Third Circuit, 222 F. 2d 875; Johnson v. United States, 1907, Fifth Circuit, 158 F. 69; King v. United States, July, 1966, Fifth Circuit, Case No. 23637, not yet reported; United States v. Hoffa, 1965, Sixth Circuit, 349 F. 2d 20; Banks v. United States, 1957, Seventh Circuit, 239 F. 2d 409; Hernandez v. United States, 1962, Ninth Circuit, 300 F. 2d 114; Von Patzoll v. United States, 1947, Tenth Circuit, 163 F. 2d 216; and Colosacco v. United States, 1952, Tenth Circuit, 196 F. 2d 165, each holding that one cannot be guilty of aiding and abetting the commission of an offense unless another person has committed a criminal violation.

Research of counsel discloses no reported case where a conviction of co-conspirators charged with § 242, Title 18, has been upheld on the theory of § 2, Title 18, U. S. C. As far as we can learn it is the first attempt of the Government to do so.

4. Did the Court Err in Not Instructing the Jury That to Convict Petitioners It Was Not Sufficient That Petitioners Had a Generally Bad Purpose, But That to Convict It Was Necessary for the Jury to Find That Petitioners Had the Specific Intent and Purpose to Wilfully Deprive Ratterman of Rights, Privileges and Immunities Secured to Him by the Fourteenth Amendment to the Constitution of the United States?

Petitioners call attention to the Court's charge which failed entirely to instruct the jury that the Government was required to prove beyond a reasonable doubt **specific intent** upon the part of appellants to conspire under § 371 to violate § 242; that is, **the specific intent to deprive of a constitutional right.** Proof beyond a reasonable doubt of such specific intent was held by the Supreme Court in Screws v. United States, supra, to be an essential ingredient of offense under what is now 18 U. S. C., § 371 and § 242. Although no exception to the trial court's charge in **Screws** was taken, the Court under Rule 52 (b) upon its own motion noted the error and upon this sole ground the judgment of conviction was reversed. In the case at bar neither the Government in brief or argument, nor the Court in opinion discussed this important contention of Petitioners and it would seem that as **Screws** remains the law today that the failure of the Court to instruct in accord with its teaching would require a reversal here.

That the Court of Appeals for the Fifth Circuit which heard the appeal of the **Screws** case, in which its affirmance of the District Court was reversed by the Supreme Court, well understood the directions given by that Court in respect to the mandatory jury instructions upon wilfullness and specific intent to deprive one of a constitutional right, it is aptly illustrated by its opinion in Pullen v. United States, 1947, 164 F. 2d 756, where **Screws** is discussed and quoted in the language at pp. 759-760 as follows:

"So we are forced to the conclusion by the opinion in the case of Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330, that the charge of the District Judge was not a 'most adequate charge' in this case. True it is that he told the jury that they must carefully consider the word 'wilfully' and that the statute provides that the 'thing done must be done wilfully,' and that in law the word 'willful' implies a conscious purpose to do wrong and a knowledge of the thing done as well as a determination to do it with evil purpose or with bad intent. But when he speaks of 'the thing done', he does not say to the jury that by the use of the term 'the thing done' he had reference to the deprivation of constitutional rights, or that he had reference to the wrongful beatings, or the wrongful inflictions of physical abuse. The opinion in the Screws case made it quite clear that the word 'willful' implies not merely 'a conscious purpose to do wrong' on the part of an officer in beating and otherwise mistreating an inhabitant while acting under color of law, but that there must be a specific intent to deprive him of a federal right, for it said in that case:

"We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.

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"For the specific intent required by the Act is an intent to deprive a person of a right * * *.

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"When they act willfully in the sense in which we use the word, they act in open defiance or in reckless

disregard of a constitutional requirement which has been made specific and definite.

* * * * * * * * *

"But in view of our construction of the word 'wilfully' the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To **convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e. g., the right to be tried by a court rather than by ordeal.** And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like." 325 U. S. at pages 103, 104, 105, 107, 65 S. Ct. at page 1036, 89 L. Ed. 1495, 162 A. L. R. 1330. (Emphasis added.)

"The implication seems to be evident in the Screws case that the statute did not intend to make one a criminal if **'his purpose was unrelated to the disregard of any constitutional guarantee.'**

"But the charge in the present case did not advise the jury that the Court was speaking of the willfulness with which the defendants must be found to have acted in reference to the deprivation of constitutional rights as distinguished from the intent with which they acted in arresting, jailing, beating, and otherwise maltreating their prisoner. It must be kept in mind that every beating by a state officer, no matter how willfully administered, is not a deprivation of a federal right as condemned by Sec. 52. The beating must be administered under color of law and with 'the purpose to deprive' the prisoner of a 'constitutional right,' e. g., the substitution of trial by ordeal for a trial by law.

"The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." Screws v. United States, supra, 325 U. S. at page 108, 65 S. Ct. at page 1039, 89 L. Ed. 1495, 162 A. L. R. 1330.

"Cf. Crews v. United States, 5 Cir., 160 F. 2d 746, 749.

"Assuming, but not deciding, that a good charge might rescue a defective indictment in certain situations, we, nevertheless, hold that a charge which is defective in the same particular in which the indictment is defective can perform no such function. In this case the indictment was defective in failing to allege that the deprivation was 'willful' and the charge to the jury was defective in the same particular in that it failed to charge that defendants must be found to have the purpose to deprive the prisoner of a constitutional right and not merely to have an evil purpose in the beatings and other maltreatments.

"If we understand the rationale of the decision in the Screws case, it is that in the absence of willfulness in the deprivation of a right under the Fourteenth Amendment there can be 'no ascertainable standard of guilt' and in the face of such an impelling viewpoint the defect in the indictment must be regarded as a matter of substance and the failure to allege willfulness and accurately to instruct the jury thereon must be regarded as prejudicial, even though no objection or exception to the charge was made.

"This Court in recent months has upheld the convictions in Screws v. United States, 5 Cir., 140 F. 2d 662, and Crews v. United States, 5 Cir., 160 F. 2d 746, both of which were brought under Sec. 52, charging deprivations of constitutional rights, and we are not

yet unmindful of the fact that the Supreme Court reversed us in the Screws case because of the fatal error of the trial Court in not instructing the jury on the question of the willfulness necessary to be proven in connection with the offense denounced by the Statute, and of which error the Supreme Court said: 'And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion.' Screws v. United States, supra, 325 U. S. at page 107, 65 S. Ct. at page 1038, 89 L. Ed. 1495, 162 A. L. R. 1330. The failure so to instruct the jury in the Screws case was never raised in the Court below, in the Circuit Court of Appeals, nor in the Supreme Court, but it was so substantial and material that the Court took note of it on its own motion."

As the **Screws** case remains the law today, an instruction based upon its holding should have been given to the jury and as held therein and in **Pullen** the failure so to charge requires a reversal.

CONCLUSION.

So at bar, absent the guilt of the alleged principals (the police) petitioners could not have aided or abetted them to violate § 242 which the jury said was done by no one, and the Court's holding would seem to decide that because an aider or abettor is punishable as a principal, no principal is required in a criminal offense. Here, as Judge O'Sullivan pointed out in quoting Judge Learned Hand, the jury verdict denies the existence of the essential facts, that is, a violation of § 242 or a plan to cause such violation under § 371.

Research of counsel which is believed to be definitive does not disclose any reported case in the annals of fed-

eral jurisprudence where Title 18, U. S. C., Sec. 2, has been applied, **absent allegation and proof of a completed crime**, and no reported case holding that a person can be guilty of a § 371 conspiracy where the alleged plan involves no one capable of committing the proscribed act.

It is accordingly urged that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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